UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

December 15, 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance on Use of Penalty Policies in Administrative Litigation

FROM: Robert Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Regional Counsels, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Compliance Assurance & Enforcement Division, Region VI
Director, Office of Enforcement, Compliance & Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I-X

A. Introduction

This document provides guidance on how penalty amounts should be pled and argued in administrative litigation and how penalty policies should be used in this process.

B. Background

On September 29, 1995, Chief Administrative Law Judge Lotis issued an Initial Decision in In Re: Employers Insurance of Wausau, ruling that EPA must present evidence other than the PCB Penalty Policy in order to support its proposed penalty. We think the decision in the Wausau case is inconsistent with decisions on the use of penalty policies by the Environmental Appeals Board, in particular DIC Americas, Inc., TSCA Appeal No. 94-2 (September 27, 1995). The Agency is appealing the Wausau decision to the Environmental Appeals Board. Accordingly, this document is being issued in response to the Wausau decision to provide guidance on our administrative penalty pleading practices and use of penalty policies. After we receive a decision from the Environmental Appeals Board on our appeal we may revise this guidance as appropriate.

C. Use of Penalty Policies in Administrative Litigation

1. Federal environmental statutes set forth various factors which EPA or a court must consider in establishing penalties. EPA's penalty policies are based on the statutory penalty factors. The policies provide EPA enforcement staff with a logical calculation methodology for determining appropriate penalties. The policies help EPA apply the statutory penalty factors in a consistent and equitable manner so that members of the regulated community are treated similarly for similar violations across the country. As policies, they are not substantive rules under the Administrative Procedure Act.[1]

2. The penalty amount sought in the administrative complaint is based on the relevant statutory factors. The penalty amount pled should be calculated pursuant to any applicable penalty policy and the specific facts of the case.[2] If there is no applicable policy, the penalty amount to be pled in the complaint should be based on the statutory factors governing penalty assessment, case law interpreting such factors, and the facts of the particular case.[3]

3. The administrative complaint should explain that the penalty requested is based on the statutory provisions governing penalty assessment and it was calculated using a policy that applies the statutory factors. Accordingly, the administrative complaint should contain a paragraph similar to this model:

> The proposed civil penalty has been determined in accordance with [cite to relevant statutory penalty provision]. For purposes of determining the amount of any penalty to be assessed. [section of the Act] requires EPA to take into

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[1] The policies are a mix of legal interpretations, general policy, and procedural guidance in how EPA should allocate its enforcement resources and exercise its enforcement discretion. As such, they are exempt from the notice and comment rulemaking requirements of the Administrative Procedures Act, 5 U.S.C. § 553

[2] Not all EPA programs have penalty policies that establish calculation methodologies for use in determining the penalty amount to plead in an administrative complaint. For example, the May 1995 *Interim Revised Clean Water Act Settlement Policy* and the May 1994 *Public Water System Supervision Settlement Penalty Policy* only establish how the Agency expects to calculate the minimum penalty for which it would be willing to settle a case; these policies are not to be used in pleading penalties, or in a hearing or at trial.

[3] The Region should not use the policy in a particular case if the penalty amount produced by the calculation methodology produces an amount that appears inconsistent with the statutory penalty factors or otherwise unreasonable. In such a case, the Region must consult with OECA prior to deviating from the policy. See *Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases*, memo issued by the Assistant Administrator, on July 11, 1994, especially page 3, and page 2 of the redelegation issued the same date, and subsequent program specific implementing guidances.

account [enumerate statutory penalty factors]. To develop the proposed penalty in this complaint, complainant has taken into account the particular facts and circumstances of this case with specific reference to EPA's [name of relevant penalty policy, if applicable], a copy of which is enclosed with this Complaint. This policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases.

4. As further support of the penalty proposed in the complaint, a case "record" file should document or reference all factual information on which EPA relied to develop the penalty amount pled in the complaint. If the Agency has an applicable penalty policy (other than an exclusive settlement policy), the file should contain a computation worksheet setting forth how the penalty was calculated in the specific case, along with a narrative description of the specific calculation. This narrative description need not be lengthy, but it should explain how any applicable penalty policy methodology was applied to the specific facts in the case.[4] If there was no applicable penalty policy, the record file should contain a narrative description of how the statutory penalty factors were applied to develop the amount pled in the complaint. In short, the record file should document the facts and rationale which formed the basis for the penalty amount pled in the administrative complaint. In the prehearing exchange, EPA counsel may provide the respondent with copies of relevant documents from the case record file.[5]

5. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 CFR §22.24, the complainant (usually the Region), has the burden of presenting why the proposed penalty is appropriate. This burden of persuasion may be subdivided into three tasks or parts:

a) why any applicable penalty policy is a reasonable approach to use in the instant case;

b) proving the facts relevant to penalty assessment; and

c) why the particular facts merit the penalty proposed in the complaint.

Each of these three tasks is discussed below.

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[4] See, e.g., the *RCRA Civil Penalty Policy*, October 1990, pages 6 to 8, 41 to 47.

[5] The case record file only should contain final documents, and not preliminary, draft, or confidential documents. For example, documents evaluating the appropriate enforcement action, planning legal strategy, or establishing a settlement penalty amount are not part of the record file and should not be released.

a. Presenting any applicable penalty policy as a reasonable approach. In the prehearing exchange or at the hearing, EPA counsel should briefly explain why the applicable penalty policy is a reasonable way to apply the statutory factors. This explanation is a legal and policy analysis, which can be presented primarily, if not entirely, in briefs based on the written policy. Administrative law judges, however, may prefer some parts of this analysis to be presented through testimony or affidavits. If the Presiding Officer or respondent challenges the rationale or the basis for the penalty policy, complainant should provide a detailed explanation of why the penalty policy is a fair and logical way to apply the statutory factors.[6] Since penalty policies are not binding rules, such challenges must be responded to on the merits. Counsel should explain how the penalty policy provides a consistent, fair and logical framework for quantifying the statutory penalty factors to the particular circumstances of the instant case. Of course, the Presiding Officer is free to adopt a different framework other than the penalty policy for applying the statutory factors and ultimately arriving at a penalty amount.

b. Proving the facts relevant to penalty assessment. In the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence. The relevant facts will depend on the circumstances of the specific case and the statutory penalty factors. Such facts usually include the number, duration, and types of violations, any economic benefit resulting from the violations, the pollutants involved, and the environmental impact of the violations. Some of these facts may have been established in proving the violations.

c. Why the particular facts merit the penalty proposed in the complaint. This task requires the complainant to persuade the Presiding Officer why the penalty requested in the complaint is appropriate based on the statutory penalty factors and the facts in the case. If a penalty policy was used to calculate the penalty, an explanation of the calculation methodology should be presented. This task is primarily, if not exclusively, a legal and policy analysis and should be done through briefs or argument. If the Presiding Officer requires testimony regarding such analysis, the Region may identify a Regional enforcement person experienced in using and understanding the applicable penalty policy, and capable of discussing the nature and seriousness of the violations in the instant case. This expert should not be the counsel in the case.

If you have any questions regarding this guidance, you may call David Hindin at 202 564-6004, or Scott Garrison at 202 564-4047.

cc: Sylvia K. Lowrance; ORE Division Directors
ORE Branch Chiefs; Workgroup members

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[6] Regions should consult with ORE on how to respond to such challenges.